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**Datasheet for the decision
of 16 June 2023**

Case Number: T 1137/21 - 3.3.05

Application Number: 13774183.1

Publication Number: 2909144

IPC: C01B39/02, C01B39/46, B01J29/70

Language of the proceedings: EN

Title of invention:
POST-TREATMENT OF A ZEOLITIC MATERIAL

Patent Proprietor:
BASF SE

Opponent:
Hoffmann Eitle

Headword:
Zeolitic Material/BASF

Relevant legal provisions:
EPC Art. 112(1)(a), 113(1), 123(2)
EPC R. 106

Keyword:

Amendments - allowable (no)

Referral to the Enlarged Board of Appeal - (no)

Right to be heard - appeal procedure - opportunity to comment
(yes)

Decisions cited:

T 2273/10, T 0389/13, T 1621/16, R 0008/11, R 0007/13,

R 0017/14

Catchword:



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Case Number: T 1137/21 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 16 June 2023

Appellant: BASF SE
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 May 2021
revoking European patent No. 2909144 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman E. Bendl
Members: T. Burkhardt
P. Guntz

Summary of Facts and Submissions

I. The patent proprietor's (appellant's) appeal is against the opposition division's decision to revoke European patent No. 2 909 144 B.

II. The opposition division concluded that:

- the main request and the second and tenth auxiliary requests at that time (current main request and second and fourth auxiliary requests, respectively) did not fulfil the requirements of Article 54 EPC
- the sixteenth and thirty-first auxiliary requests at that time (current sixth and eleventh auxiliary requests, respectively) did not fulfil the requirements of Article 56 EPC

On the other hand, all these requests were found to fulfil the requirements of Article 123(2) EPC.

III. The first, third, eleventh, seventeenth to nineteenth and thirtieth auxiliary requests at that time (current first, third, fifth and seventh to tenth auxiliary requests, respectively) were not discussed at the oral proceedings at the opposition stage and are not part of the decision under appeal.

IV. Independent claim 1 of the main request and of the sixth auxiliary request reads as follows:

"1. A process for the post-treatment of a zeolitic material, the process comprising

- (i) providing a zeolitic material, wherein the framework structure of the zeolitic material comprises SiO₂ and Al₂O₃;
- (ii) subjecting the zeolitic material provided in (i) to a method comprising
 - (a) treating the zeolitic material with an aqueous solution having a pH of at most 5, wherein the aqueous solution comprises an organic acid and/or an inorganic acid;
 - (b) treating the zeolitic material obtained from (a) with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature of at least 75 °C for a period in the range of from 1 h to 24 h, wherein the liquid aqueous system comprises at least 90 weight-% water;

wherein in (ii) and after (b), the zeolitic material is optionally subjected to at least one further treatment according to (a) and/or at least one further treatment according to (b);

wherein the pH of the aqueous solution according to (a) and the pH of the liquid aqueous system according to (b) is determined using a pH sensitive glass electrode, wherein the zeolitic material provided in (i) has a LEV, CHA, MFI, MWW or BEA framework structure."

V. In claim 1 of the first, third, fifth, seventh, ninth and eleventh auxiliary requests, the lower limit of the period in step (ii)(b) is increased to 6 h.

VI. In claim 1 of the second, third, fourth, fifth, eighth, ninth, tenth and eleventh auxiliary requests, the following feature has been inserted after step (ii)(b):

"... wherein providing the zeolitic material in (i) comprises an organotemplate-free synthetic method comprising

(1) preparing a mixture comprising seed crystals and at least one source for SiO_2 and at least one source for Al_2O_3 , and

(2) crystallizing the zeolitic material from the mixture prepared in (1), wherein the seed crystals used in (1) comprise zeolitic material having the framework structure of the zeolitic material to be provided in (i),"

VII. The feature

"wherein in (ii) and after (b), the zeolitic material is optionally subjected to at least one further treatment according to (a) and/or at least one further treatment according to (b);"

has been replaced in the fourth auxiliary request by:

"wherein the method according to (ii) comprises

(a) treating the zeolitic material with an aqueous solution having a pH of at most 5;

(b) treating the zeolitic material obtained from (a) with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature of at least 75 °C for a period in the range of from 1 h to 24 h;

(a) treating the zeolitic material obtained from (b) with an aqueous solution having a pH of at most 5; wherein the zeolitic material obtained from the last step (a) is subjected to at least one further sequence of a treatment according to (b) followed by a treatment according to (a);

wherein after (a), the zeolitic material is subjected to a treatment with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature in the range of from 15 °C to 35 °C, wherein after this treatment, the zeolitic material is subjected to calcination,"

in the fifth auxiliary request by:

"wherein the method according to (ii) comprises
(a) treating the zeolitic material with an aqueous solution having a pH of at most 5;
(b) treating the zeolitic material obtained from (a) with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature of at least 75 °C for a period in the range of from 6 h to 24 h;
(a) treating the zeolitic material obtained from (b) with an aqueous solution having a pH of at most 5;
wherein the zeolitic material obtained from the last step (a) is subjected to at least one further sequence of a treatment according to (b) followed by a treatment according to (a);
wherein after (a), the zeolitic material is subjected to a treatment with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature in the range of from 15 °C to 35 °C, wherein after this treatment, the zeolitic material is subjected to calcination,"

in the tenth auxiliary request by:

"wherein the method according to (ii) comprises
(a) treating the zeolitic material with an aqueous solution having a pH in the range of from 0 to 2;
(b) treating the zeolitic material obtained from (a) with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature of at least 75 °C for a period in the range of from 1 h to 24 h;
(a) treating the zeolitic material obtained from (b) with an aqueous solution having a pH in the range of from 0 to 2;

wherein the zeolitic material obtained from the last step (a) is subjected to at least one further sequence of a treatment according to (b) followed by a treatment according to (a);

wherein after (a), the zeolitic material is subjected to a treatment with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature in the range of from 15 °C to 35 °C, wherein after this treatment, the zeolitic material is subjected to calcination,"

and in the eleventh auxiliary request by:

"wherein the method according to (ii) comprises
(a) treating the zeolitic material with an aqueous solution having a pH in the range of from 0 to 2;
(b) treating the zeolitic material obtained from (a) with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature of at least 75 °C for a period in the range of from 6 h to 24 h;
(a) treating the zeolitic material obtained from (b) with an aqueous solution having a pH in the range of from 0 to 2;

wherein the zeolitic material obtained from the last step (a) is subjected to at least one further sequence of a treatment according to (b) followed by a treatment according to (a);

wherein after (a), the zeolitic material is subjected to a treatment with a liquid aqueous system having a pH in the range of 5.5 to 8 and a temperature in the range of from 15 °C to 35 °C, wherein after this treatment, the zeolitic material is subjected to calcination,"

VIII. In claim 1 of the tenth and eleventh auxiliary requests, the feature

"wherein the zeolitic material provided in (i) has a LEV, CHA, MFI, MWW or BEA framework structure."

has been omitted and it has been specified in step (i) that the zeolitic material is one "having a BEA framework structure".

IX. The appellant's arguments at the appeal stage which are relevant to the present decision can be summarised as follows.

- All the claim requests met the requirements of Article 123(2) EPC. Claim 1 of the main request was based on claims 1, 4, 9, 11, 13 and 17 as originally filed. Neither the number of possible combinations nor the selection of features with varying degrees of preference should play a role in the assessment of Article 123(2) EPC.
- The rationale of T 2273/10 did not apply since it related to a case with preferred or non-preferred alternatives.
- By contrast, since the inventive examples of the application as originally filed were a pointer to the combination of features of claim 1 and since the new combination of features was not associated with an undisclosed technical contribution, and because of T 1621/16, it had to be concluded that the requirements of Article 123(2) EPC were met.
- In the event that none of the requests met the requirements of Article 123(2) EPC, this would be inconsistent with T 1621/16. Moreover, since this question related to a point of law of fundamental

importance, the following questions were to be referred to the Enlarged Board of Appeal:

"1. Considering the uniform concept of disclosure for Articles 54 and 123 EPC, is the use of the term 'preferably' for designating convergent alternatives in a claim equivalent to a sequence of convergent dependent claims defining the same alternatives?"

2. If the answer is no, in how far does the disclosure of a sequence of convergent dependent claims differ from the disclosure of the same sequence of features expressed in terms of convergent alternatives in a single claim?"

- Under these circumstances, rejecting a request for referral violated the appellant's right to be heard.

X. The respondent's arguments at the appeal stage are reflected in the reasons below.

In particular, claim 1 of the main request was the result of a multiple selection from lists of some length. The examples were not a sufficient pointer to this specific combination. Hence, the requirements of Article 123(2) EPC were not fulfilled.

XI. At the oral proceedings, the appellant raised an objection under Rule 106 EPC.

XII. The appellant requested that the decision under appeal be set aside and the patent be maintained as amended on the basis of the main request. As an auxiliary measure it requested that the patent be maintained as amended

on the basis of one of the first to eleventh auxiliary requests. The appellant submitted all these requests with its statement setting out the grounds of appeal.

The opponent (respondent) requested that the appeal be dismissed.

Reasons for the Decision

1. Main request: amendments (Article 123(2) EPC)

The main request is identical to that considered in the decision under appeal.

1.1 The appellant argued that claim 1 of the main request was based on claims 1, 4, 9, 11, 13 and 17 as originally filed.

The inventive examples were pointers since all of them fell under the wording of the claim at issue.

Therefore, claim 1 did not present the skilled person with new information.

T 2273/10 only distinguished between preferred or non-preferred features ("*caractéristiques préférées ou non-préférées*", reasons 2.9) and had been superseded by T 1621/16, which sought to harmonise the approach with regard to lists of converging alternatives.

1.2 However, for the reasons set out below, the requirements of Article 123(2) EPC are not met.

According to the "gold standard" for assessing compliance with Article 123(2) EPC, any amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed. After the amendment the skilled person may not be presented with new technical information (Case Law of the Boards of Appeal, 10th ed., 2022, II.E.1.1).

1.3 Claim 1 as originally filed in combination with the dependent claims and the general part of the description covers a large number of possibilities relating to:

- the nature of the zeolitic material
- numerous steps of the post-treatment process and sequences of those steps
- numerous operating parameters to be respected during the process steps

Furthermore, many features of claim 1 of the main request are claimed in varying degrees of preference in the dependent claims and/or in the general part of the description.

In a case such as this, a systematic approach to deciding whether the requirements of Article 123(2) EPC are met cannot be followed; this has to be decided on a case-by-case basis.

1.4 Regarding claim 1 of the main request, the appellant has not indicated a single passage of the original application that discloses - in combination - the features of claim 1 of the main request.

Claim 1 is the result of a multiple selection of a very specific combination of features from different dependent claims as originally filed. These selections are made from among numerous possibilities and different degrees of preference:

- a zeolitic material in general: according to claim 17 as originally filed, a less preferred alternative than zeolite beta
- a framework structure that comprises SiO₂ and Al₂O₃: according to claim 13 as originally filed, these are the preferred elements of the lists for Y and X, respectively
- the use of an aqueous solution comprising an organic acid and/or inorganic acid in step (ii) (a): according to claims 1 and 4 and page 7, lines 16 to 24 as originally filed, this alternative is more preferred than an unspecified aqueous solution and less preferred than the lists of specific organic and inorganic acids
- a pH in step (ii) (a) of at most 5: according to claim 5 as originally filed, this alternative is less preferred than the range between 0 and 2
- a duration of step (ii) (b) in the range from 1 h to 24 h: this duration is more preferred than the unspecified duration of claim 1 and mixes more or less preferred end points of claim 9 as originally filed
- a water concentration of at least 90% in step (ii) (b): this concentration is more preferred than the unspecified concentration in claim 1 as originally

filed but less preferred than the lower limits 99% and 99.9% of claim 11 as originally filed

- after the mandatory steps (ii)(a) and (ii)(b), the optional presence of a further step (a) and/or (b): as indicated on page 5, lines 1 to 3, 13 and 25 to 26, such a sequence is less preferred than one with a mandatory step (a) after step (ii)(b)
- a framework structure of the list LEV, CHA, MFI, MWW or BEA: this list is more preferred than the unspecified structure in claim 1 as originally filed but less preferred than BEA (claim 17 as originally filed)

In addition and by contrast, none of the options of dependent claims 2, 3, 5 to 8, 10, 12, 14 to 16 and 18 as originally filed have been inserted into claim 1.

In view of the sheer number of possibilities, the subject-matter of claim 1 at issue is not directly and unambiguously derivable from the dependent claims, even when the general part of the description is taken into account.

1.5 It is true that the inventive examples still fall under claim 1 of the main request.

However, these examples are not sufficient as a pointer to the specific selection defined in claim 1 since they fall under the most preferred options of the various parameters and ranges.

1.6 Claim 1 thus corresponds to a multiple selection from a large number of lists and possibilities without a specific pointer.

Contrary to the appellant's view, the skilled person is presented with new information. While the core of the invention (e.g. as illustrated by the inventive examples) may have remained the same, the boundaries of the subject-matter to be protected have changed in a way that is not directly and unambiguously derivable from the application as originally filed, in particular in view of the large number of selections made.

- 1.7 Process claim 1 of the main request therefore does not meet the requirements of Article 123(2) EPC.
- 1.8 Contrary to the appellant's opinion, there is no diverging case law in this regard either.
- 1.8.1 The conclusions are in line with T 389/13, which also dealt with a case where several parameters had been inserted into claim 1 and concluded that the requirements of Article 123(2) EPC were not met (reasons 3).

The board in that case argued that allowing the various restrictions to the boundaries of the invention in combination would be unfair to third parties. It would give an unwarranted advantage to an applicant or a patentee who filed a broad speculative claim without clearly defined fall-back positions for the combination of parameters and ranges (see in particular reasons 3.10).

- 1.8.2 The findings are also in line with T 2273/10 (reasons 2), cited by the respondent, which concluded that a selection of preferred and particularly preferred alternatives from several lists without a

pointer to that specific combination violated Article 123(2) EPC.

The appellant argued that T 2273/10 did not apply since it in fact dealt with a case involving selections from preferred and non-preferred alternatives ("*Ces sélections se réfèrent aux caractéristiques préférées ou non-préférées*"), not one involving alternatives having varying levels of preference. The appellant referred to point 2.9 of the reasons in this regard.

However, that passage of the reasons must not be read in isolation; it refers to the preceding paragraphs as indicated by the first words of the passage: "for each of the three characteristics mentioned above..." ("*Pour chacune des trois caractéristiques mentionnées ci-dessus...*"). The expression thus means selections from more or less preferred alternatives.

- 1.8.3 The appellant argued that since the amendments to claim 1 of the main request allegedly related to lists of converging alternatives, T 1621/16 should be followed.

According to points 1.4 and 1.7.2 of the reasons of that decision, lists of converging alternatives are lists of options ranked from the least to the most preferred, where each of the more preferred alternatives is fully encompassed by all the less preferred and broader options in the list. Lists of non-converging alternatives, by contrast, are lists of mutually exclusive or partially overlapping elements.

Point 1.7.3 of the reasons of that decision states that "at least" two conditions have to be met for Article

123(2) EPC in the case of multiple selections from lists of converging alternatives.

- Firstly, the application as originally filed has to include a pointer to the combination of features resulting from the multiple selection. Such pointers can be provided by the examples if they still fall under the amended claim.

It is noted that in view of point 1.8.7 of the reasons of that decision, the expression "... if an amended claim falls within the/these example(s) or embodiment(s)" in point 1.7.3 of the reasons seems to be an obvious confusion: it is not the amended claim that has to fall within the example(s) but the other way round.

- Secondly, the subject-matter resulting from the multiple selections must not be associated with an undisclosed technical contribution.

Notwithstanding whether the board in this case agrees with the second condition, no convincing reasons have been put forward as to why this condition is not fulfilled in the case at issue.

Nonetheless, the case underlying T 1621/16 and the case in hand are not comparable, and the conclusions of T 1621/16 cannot be applied as such to this case.

- Firstly, the conditions of T 1621/16 relate to selections from lists of converging alternatives. However, as regards the period in step (ii) (b) of claim 1 at issue, the appellant chose to combine the preferred lower end point 1 h and the broad upper end point 24 h of claim 9 as originally filed. By arbitrarily combining the end points, the

appellant has taken claim 9 as originally filed not as a list of converging alternatives but as a kind of pool of elements from which individual elements are combined. Therefore the selections made in claim 1 cannot be considered selections from a list of converging alternatives. The board notes in this regard that the appellant has not disputed the respondent's view that the case in hand also includes selections from non-converging lists.

- Secondly, while the amendments in T 1621/16 relate to the nature of the components of a four-component composition, to the weight fractions of the components and to certain relationships between the weight fractions, the case in hand relates not only to the nature of the zeolitic material to be used but also to:
 - the steps of the post-treatment process and the sequences of those steps, and
 - the substances to be used and the operating parameters to be respected during said process steps

This means that possible amendments can go in more independent directions, thus increasing the number of "degrees of freedom", and the number of possible selections and combinations of features is significantly higher than in T 1621/16.

The appellant's argument that the number of possibilities should not play a role as regards whether the subject-matter of the claim is directly and unambiguously derivable from the application as originally filed is not persuasive. The number of selections and the number of alternatives within each selection definitely play a role. Similarly, the length

of a number of lists is a criterion when assessing novelty over a piece of the prior art.

Consequently, the board considers that the two criteria in point 1.7.3 of the reasons of T 1621/16 are not sufficient in the case in hand and that the number of "degrees of freedom" and the number of possible selections and combinations have to be accounted for as well.

This does not contradict T 1621/16 as the expression "**at least** the following two conditions should be met" (emphasis by the board) in point 1.7.3 of the reasons confirms that the two conditions are not necessarily sufficient in every case of multiple selections from lists of converging alternatives.

Consequently there is no diverging case law in this regard.

2. Auxiliary requests: amendments (Article 123(2) EPC)

With regard to the auxiliary requests, at the oral proceedings the appellant merely referred to its written submissions.

For the following reasons, the conclusions regarding the main request apply *mutatis mutandis* to these auxiliary requests (Article 123(2) EPC).

2.1 Compared with process claim 1 of the main request:

- Claim 1 of the second auxiliary request furthermore requires the preferred organotemplate-free

synthetic method (based on claim 16 as originally filed; see also page 12, lines 12 to 19).

- Claim 1 of the fourth auxiliary request furthermore requires the preferred organotemplate-free synthetic method, the preferred sequence of steps a-b-a-b-a and the preferred washing step after a step (a) with the preferred washing conditions (based on claims 2, 3 and 16 as originally filed; see also page 12, lines 12 to 19; page 5, lines 13 to 35; page 6, lines 12 to 34).

- Claim 1 of the eleventh auxiliary request furthermore requires the preferred organotemplate-free synthetic method, the preferred sequence of steps a-b-a-b-a, the preferred medium duration of 6 h of step (ii)(b), the preferred BEA framework and the preferred washing step after a step (a) with the preferred washing conditions (based on claims 2, 3, 5, 9 and 16 as originally filed; see also page 12, lines 12 to 19; page 5, lines 13 to 35; page 6, lines 12 to 34).

While the second, fourth and eleventh auxiliary requests thus contain a higher number of preferred options, they still contain parameters corresponding to less preferred options, i.e. at least:

- the use of an organic and/or inorganic acid in step (ii)(a)
- the broadest upper limit for the duration of step (ii)(b), i.e. 24 h
- the lowest minimum water concentration in step (ii)(b), i.e. 90%
- no washing step following step (a) for the second and the sixth auxiliary requests, and a washing step and the broadest calcination temperature and

duration (broadest since they are unspecified) for the fourth and eleventh auxiliary requests

Claim 1 of the sixth auxiliary request is identical to that of the main request.

The reasoning regarding claim 1 of the main request therefore applies *mutatis mutandis* to claim 1 of the second, fourth, sixth and eleventh auxiliary requests.

- 2.2 As far as claim 1 of the remaining auxiliary requests is concerned - notwithstanding the question of whether these requests are considered - the appellant did not dispute that these claims merely combine amendments of the main request and the second, fourth and/or eleventh auxiliary requests.

The reasoning presented above therefore applies *mutatis mutandis* to the remaining auxiliary requests.

3. Request for a referral to the Enlarged Board of Appeal (Article 112(1) EPC)

- 3.1 In the appellant's view the board's assessment of the case in hand with regard to Article 123(2) EPC would be different if, instead of the converging alternatives being nested within the same claim and separated using the expression "preferably", the same alternatives were the subject of a sequence of convergent dependent claims. In other words, had the alternatives been drafted as a sequence of convergent dependent claims, the board, in the appellant's opinion, would have come to a different conclusion as far as Article 123(2) EPC is concerned.

Moreover, decisions T 2273/10 and T 1621/16 represented diverging case law in relation to the case at issue.

In the appellant's view, as these issues were of fundamental importance, the questions indicated under point IX. were to be referred to the Enlarged Board of Appeal.

3.2 However, the appellant's assumptions are incorrect.

Generally speaking, the question to be answered is whether the subject-matter of claim 1 at issue is directly and unambiguously derivable from the application as originally filed.

Contrary to the appellant's opinion, the board's conclusion would remain the same if the various parameters with different levels of preference were drafted as a sequence of dependent claims and not with alternatives nested within the same claim.

For example, even if the various ranges of the period in process step (ii) (b), i.e. 0.5 h to 24 h, 1 h to 18 h, and 6 h to 10 h, were not nested within the same claim as originally filed (in this case claim 9 as originally filed) but drafted as a sequence of dependent claims, it would have been necessary to combine end points from different dependent claims to arrive at the range of from 1 h to 24 h in claim 1 of the main request. Under the circumstances in hand, any such selection in combination with all the other parameters of claim 1 would not have met the requirements of Article 123(2) EPC either.

The appellant also insinuated that the approaches applied for dealing with the concepts of disclosure for

Articles 123(2) EPC and 54 EPC in the case in hand were different but has failed to submit evidence in this regard.

However, the concepts of disclosure for Article 54 and 123(2) EPC are uniform since multiple selections from parameter ranges must also not be assessed separately when assessing novelty (Case Law of the Boards of Appeal, 10th ed., I.C.6.3.3). In other words, the fact that all the features of a claim are disclosed in a prior-art document in isolation does not also necessarily mean that the subject-matter of the claim is directly and unambiguously derivable from the prior-art document. At any rate, the board subscribes to the principle of uniform disclosure for Articles 54 and 123(2) EPC.

Hence, the questions proposed by the appellant are of no relevance to the case in hand.

With regard to decision T 1621/16, point 1.8.3 above explains why the case law in view of the case at issue is not diverging and that, therefore, the conclusions of T 1621/16 do not apply here. There is thus also no point of law of fundamental importance that the board could not answer itself.

For these reasons, the appellant's request for a referral to the Enlarged Board of Appeal is rejected (Article 112(1)(a) EPC).

4. Objection under Rule 106 EPC

4.1 At the oral proceedings, the appellant raised an objection under Rule 106 EPC since the board had

decided not to submit its questions to the Enlarged Board of Appeal.

In the appellant's view, its right to be heard under Article 113(1) EPC had therefore not been respected. In particular, the appellant had been deprived of its right to be heard before the Enlarged Board of Appeal.

The appellant cited R 8/11, R 7/13 and R 17/14 in this regard.

- 4.2 Regarding a merely formal issue, the appellant raised the objection after the end of the debate, i.e. once the substantive debate had already ended and when the board had announced the conclusion of its (final) deliberation (see the minutes, page 2, penultimate paragraph).

Before the end of the debate, each party was explicitly asked about their requests and whether they had any further comments. Requests cannot be deemed filed in a timely manner if a party waits for the board to announce its opinion and then complains if its requests have not been granted.

Even if the arguments had been put forward in time, they would not have been successful, as explained below.

- 4.3 A violation of the appellant's right to be heard is not to be confused with the board not sharing the appellant's view.

The appellant even admitted that it was able to present its case in this regard (see the minutes). This proves

that the appellant's right to be heard in this respect is satisfied.

Article 112(1)(a) EPC clarifies that a board only refers questions to the Enlarged Board of Appeal in the event of diverging case law or for points of fundamental importance. It is in the board's discretion to establish whether this is the case; this is even confirmed by R 8/11, cited by the appellant (reasons 2.3).

However, as set out above under points 1.8.3 and 3., in the case in hand there is no diverging case law or question of law of fundamental importance, and the board could come to a legally sound decision without submitting the questions to the Enlarged Board of Appeal. The board thus exercises its discretion and does not refer the questions.

Moreover, R 8/11, R 7/13 and R 17/14 do not legitimise an absolute right to have questions submitted to the Enlarged Board - quite to the contrary in fact, as has been clearly set out by the Enlarged Board e.g. in R 8/11, reasons 2.3. Thus, presenting a case in front of the Enlarged Board is not an absolute right that could be violated. It should be pointed out that all the above-mentioned decisions concluded that the respective petitions were clearly inadmissible and/or clearly not allowable.

The appellant's right to have the reasons for the rejection of its referral request stated in the final decision under Article 112(1)(a) EPC is also satisfied (see points 1.8.3 and 3.).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated